

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 156 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

CHAUHAN BHAKTIBHAI BHUDARBHAI

Versus

SHANABHAI DAHYABHAI DECD.THRO'HIS HEIR PITAMBARBHAI CHRISTI

Appearance:

MR HM PARIKH for Appellant

MR IM PANDYA for Respondent No. 1

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 29/07/1999

ORAL JUDGEMENT

The present respondent filed a civil suit against the present appellant for redemption of a mortgage property and for the possession of the suit property. The suit was filed in the court of Civil Judge (Junior Division) at Umreth, being Regular Civil Suit No.69 of 1983. It was stated that an agriculture land bearing Survey No.2889/2 admeasuring 2 Acre 22 Guntha which is situated at village Alina, Taluka Nadiad, is owned by the

plaintiff. Out of this land, 1 Acre 12 Guntha of the southern portion of the above mentioned land was mortgaged to the defendant by a deed dtd. 16.8.1960 for Rs.875/-. A notice was issued to the defendant dtd.29.4.83, which was not properly replied by the defendant and, therefore, the suit was filed. The present appellant - defendant appeared and has filed written statement and alongwith other contention, it was contended on behalf of the defendant that this land was earlier mortgaged to the defendant or in predecessor-in-interest once for Rs.101/-, and again for Rs.808/-, and this third time the properties mortgaged to the defendant. The dates of the earlier transactions are 27.3.55 and 6.6.57. It was contended that according to the writing which is in the mortgage deed dated 16.8.60 is a deed of sale. It was contended by the defendant that the special condition in the mortgage deed was that the defendant was to be paid the amount of consideration within 20 years by the plaintiff and if plaintiff fails to repay this amount borrowed by him, the plaintiff will not be entitled to have any rights over the property. The trial Court after recording of the evidence and hearing the parties, came to the conclusion that the suit property was owned by the plaintiff and that the property was mortgaged to the defendant by an unregistered document. It was held by the trial Court that the plaintiff was not entitled to redeem the mortgage because the deed was not registered as per section 59 of the Transfer of Property Act, (hereinafter referred to as 'the Act'). The contention of the defendant that the suit is barred by limitation and the plaintiff loses the right over the property were also denied by the trial court. The trial Court dismissed the suit vide judgment and decree dtd. 30.3.91. Being aggrieved, defendant filed an appeal being Regular Civil Appeal No.37 of 1991, before the District Court, Kheda at Nadiad, wherein, 4th Extra Assistant Judge, Kheda at Nadiad framed six points for determination:

1. Whether the plaintiff (appellant) proves that the suit property was mortgaged by English Mortgage or any type of mortgage as per Section 58 of T.P. Act to the defendant for Rs.875/- on 16.8.68 of about that period ?
2. Whether the plaintiff (appellant) proves that whether he is ready and willing to pay the amount and he is entitled for the redemption of the property ?

3. Whether the defendant (respondent) proves that the suit is barred by limitation and non-joinder of parties ?
4. Whether the defendant (respondent) proves that he is owner as per the condition of the deed and also proves that the plaintiff has not performed the condition to repay the amount within the stipulated period in the agreement and for that he is being owner of the suit property ?
5. Whether the appellant is entitled to relief as claimed in appeal memo ?
6. What order and decree ?

2. Ultimately after hearing the parties, the First Appellate Court held that the document in question was mortgage deed only. The First Appellate Court also came to believe that the plaintiff was ready and willing to pay the amount of redemption of the mortgage. The First Appellate Court came to a conclusion that the suit is not barred by limitation nor the defendant was able to prove that as per the condition of the deed, the defendant became the owner of the property. Ultimately, the First Appellate Court came to the conclusion that the plaintiff was entitled to the redemption of the mortgage property and, therefore, a decree of the redemption was passed by the First Appellate Court after setting aside the judgment and decree of the trial court by which the suit of the plaintiff was dismissed.

3. The trial Court after relying on a decision of the Supreme Court in the matter of Kolathoor Variath and another Vs. Pairaprakottoth Cheriya Kumhahammad Haji as reported in A.I.R. 1974 Supreme Court page 689 came to a conclusion that no decree can be passed for redemption in suit based on unregistered mortgaged deed. The Supreme Court in the above mentioned decision observed that mortgage deed was required to be registered and for want of registration the mortgage in question could not be looked into or it cannot be proved by the plaintiff. While learned First Appellate Judge entered into the discussion of the type of the mortgage and came to the conclusion that there was a term in the deed regarding the use of the consideration which the mortgagor was to receive from the mortgagee, this was not the deed of a sale with condition to re-purchase. The learned First Appellate Judge observed that the status of the parties were of the creditor and debtor and, therefore, it was a deed of mortgage. Deciding the dispute regarding want of

registration of a document as per section 59 of the Act, learned First Appellate Judge observed that, the principle 'once a mortgage always a mortgage' would be applicable and secondly, that since there was a term in the document that the mortgagor was to make a payment of the mortgage to the mortgagee within 20 years, failing which the mortgagee was to become the owner of the property was a clog on the equity of the redemption and, therefore, according to the First Appellate Court, even if, the document was not registered as per sec.59 of the Act, the plaintiff was entitled to have a decree of redemption on the basis of an un-registered mortgage deed.

4. Being aggrieved original defendant has filed this second appeal, in which while admitting the appeal on 5th March, 1999, following three substantial questions of law were raised.

1. Whether on the facts and circumstances of the case, the judgment and decree passed by the lower appellate court is in accordance with law ?
2. Whether the lower appellate court was justified in law in holding that the suit for redemption of a mortgage was maintainable on the basis of an unregistered mortgage deed ?
3. Any other question which may arise at the time of hearing ?

5. Learned advocate Mr.H.M.Parikh on behalf of appellant and learned advocate Mr.I.M.Pandya on behalf of respondent were heard.

6. Mr. Parikh, learned advocate for the appellant, while making grievance against the decision of the First Appellate Court has argued that, it was not necessary to enter into the discussion of the type of the mortgage nor it was relevant that whether there is a clog on the equity of redemption or not. According to Mr. Parikh, the simple question that is arisen is whether for the want of registration of a mortgage deed the plaintiff was entitled to a decree of redemption. Mr.Parikh has relied on the above mentioned decision of the Supreme Court which was relied by the trial court. Mr.Parikh has argued that the First Appellate Court did not prefer to refer this judgment or did not prefer to give reasons for setting aside the reasoning of the trial court which was based on above mentioned Supreme Court decision.

7. While on the other hand, Mr. Pandya has argued that the First Appellate Court in para.7 of its judgment has rightly held that there was a term of 20 years for the repayment of the mortgage money which was a clog on the equity of redemption, and according to sec.60 of the Act, the right of redemption cannot be circumscribed by any condition and, therefore, the trial Court has rightly come to the conclusion that the term of 20 years fixed in the deed of the mortgage for the repayment was the clog on the equity of redemption. Mr.Pandya after relying on a decision of the Madhya Pradesh High Court in the matter of Raghunath Singh and another Vs. Kishanlal(deceased by L.R.) as reported in A.I.R. 1986 M.P. page 215 para 12 has argued that, 'once a mortgage is always a mortgage' and right of redemption of the mortgagor cannot be circumscribed or a mortgagor cannot be prevented to redeem the mortgage. The First Appellate Court has also relied upon a decision in coming to a conclusion that a redemption is permitted on an unregistered document.

8. Considering the rival contentions of the learned Counsels and considering the substantial questions of law which has arisen in this matter, the only question which arises is whether plaintiff was entitled to a redemption in pursuance of an unregistered document. Section 59 of the Transfer of Property Act runs as under:

"Mortgage when to be by assurance - Where the principal money secured is one hundred rupees or upwards, a mortgage, other than a mortgage by deposit of title deeds, can be effected only by a registered instrument signed by the mortgagor and attested by atleast two witnesses."

9. The Supreme Court in its above mentioned decision Kolathoor Variath and another (Supra) has categorically observed that the plaintiff cannot regain possession on the basis of an oral mortgage as it cannot be proved in a court of law for want of registration, it is open to him to recover possession on the strength of his title.

10. The law makes it compulsory that any mortgage transaction, consideration of which is above Rs.100/requires registration. According to sec.49 of the Registration Act, any document which requires a registration will not be received in the evidence and cannot be proved to prove the terms of the document. It is settled law that such documents fails of effect and are void as regard the immovable property comprised therein. Such documents cannot be received as evidence

of any transaction affecting such property and therefore unregistered mortgage document has no legal effect and is invalid as a mortgage. So far as this law is concerned, such document in law are non-existent document and only for the certain collateral purposes such document can be seen. The trial Court has rightly taken a support from the above mentioned decision of the Supreme Court that mortgage cannot be proved by an unregistered document. So question of redemption would not arise at all.

11. Now, so far as the reasonings of the First Appellate Court is concerned, the First Appellate Court has fallen in a grave error firstly entering into the discussion of the types of mortgage, and secondly, came to a conclusion that even in pursuance of an unregistered mortgage deed which is required to be registered under sec.59 of the Act, the plaintiff would be entitled to a relief of redemption of a mortgage. Mr. Pandya, learned Counsel for the respondent and the First Appellate Court has placed reliance on the decision of the Madhya Pradesh High Court. Reading the judgment of the Madhya Pradesh High Court in the matter of Raghunath Singh (Supra) in para 12, as observed as under:

"Furthermore, S.59 of T.P.Act, which is being reproduced below, creates a mandate that mortgage of Rs.100 or upwards of valuation is compulsorily registrable :

"59. Mortgage when to be by assurance - Where the principal money secured is one hundred rupees or upwards, a mortgage, other than a mortgage by deposit of title deeds, can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property."

Thus, the requirement of this provision cannot be got over by applying the doctrine of part performance. Consequently, an admission by the mortgagor that the mortgagee was in possession of the property as a mortgagee under an oral mortgage for a consideration of more than one hundred rupees cannot create a mortgage, nor an entry in the revenue record to that effect is sufficient. The principle that 'once a mortgage

always a mortgage' will not be applicable, as there is no mortgage at all. Even where the mortgage is not a valid transaction because of non-compliance with S.59, T.P.Act, the mortgagee may acquire the status of a mortgagee by prescription. It is for the mortgagee to have a proper and valid mortgage deed executed in his favour. If the mortgage deed is defective due to non-registration and the mortgagee takes possession of the mortgaged property, the principle 'once a mortgage always a mortgage' applies, and the mortgagee cannot be permitted to resist the redemption by the mortgagor. But, in this case, as no mortgage deed has been produced, and no oral or other evidence in proof of the mortgage deed can be accepted and the defendants have also not taken the plea of mortgage, the first appellate Court has committed an error in law in passing a decree for redemption in favour of the plaintiff."

12. It is much clear that the High Court of Madhya Pradesh has said that qua the property mortgaged the status of the mortgagor and mortgagee remain as it is, it does not change. Therefore, the principle that 'once a mortgage is always a mortgage' is attracted; meaning thereby mortgagor and mortgagee remain as it is and the property remain as mortgage property. The judgment never establishes that a mortgagor is entitled to have a redemption by filing a suit in pursuance of an unregistered document, and that a Civil Court can pass a decree of redemption even on an unregistered mortgage deed in contravention of sec.59 of the Act, on the principle that "once a mortgage is always a mortgage". Meaning thereby, for want of registration of the mortgage document, mortgagee would not loose his right as an owner of the property nor mortgagee would become an owner of the property. If the redemption is possible except by resorting to the process of law mortgagee cannot be permitted to resist the redemption by the mortgagor in those circumstances on the ground that the document is not registered. Therefore, the ratio of this decision is not properly understood by the First Appellate Court. It is nowhere laid down in the above mentioned decision that, even by an unregistered document, in contravention of sec.59 of the Act, court of law can give a relief of redemption to any mortgagor. It only shows that in absence of registration of any mortgage deed qua mortgage property, the status of the mortgagor and mortgagee remain the same and neither mortgagor loses his right as an owner nor mortgagee becomes an owner of the property

and, therefore, the principle as 'once a mortgage is always a mortgage', is not at all attracted to grant a decree of redemption on an unregistered mortgage deed and hence the Supreme Court in above referred case made it very clear that in these circumstances a suit based on title by mortgagor is the remedy.

13. In this view of the matter, reasoning and conclusions arrived at by First Appellate Court are not only misconceived but perverse and against the established law and the principle enunciated by the Supreme Court in the above referred case. Though the fixing of term of repayment by the mortgagee would not by itself a clog on redemption as observed by the First Appellate Court, but in this case while valid mortgage has not been proved the question of clog on equity of redemption would not at all arise.

14. Learned Counsel Mr. Pandya for respondent lastly argued that the transaction of mortgage is in contravention of the Prevention of the Fragmentation Act and on this count also, as observed by the First Appellate Court is required to be decreed. This argument of Mr. Pandya has no substance. Plaintiff may take recourse to law if the transaction in contravention of the provisions of the Prevention of Fragmentation Act, but certainly this fact would not validate an unregistered document of mortgage so as to grant a relief of redemption.

15. In view of the above discussion, appeal is allowed. The judgment and decree of the First Appellate Court in Regular Civil Appeal No.37 of 1991 is set aside and the judgment and decree of the trial court in Regular Civil Suit No.69 of 1983 dismissing the suit is restored. No order as to costs.

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